

STATE OF MICHIGAN
COURT OF APPEALS

RAFAEL TORRES,

Plaintiff-Appellee,

v

TERRI LYNN TORRES,

Defendant-Appellant.

UNPUBLISHED

August 19, 2014

No. 314453

Kent Circuit Court

LC No. 10-005563-DM

Before: GLEICHER, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

The parties submitted their divorce proceedings to binding arbitration. Evidence submitted to the arbitrator revealed that Dr. Rafael Torres is entitled to a United States Air Force pension after achieving 20 years of service. The arbitrator's initial decision entirely overlooked Dr. Torres's Air Force pension. When Terri Lynn Torres brought this omission to the arbitrator's attention, he acknowledged the existence of the unvested pension but refused to value or equitably divide it. As a result, the award on its face improperly treats the pension as Dr. Torres's separate property. We reverse the circuit court's affirmance of the arbitration award and remand for reconsideration of the pension distribution.

I. BACKGROUND

Dr. and Mrs. Torres married in 1994 and have three children. In June 2010, Dr. Torres filed for divorce and the parties stipulated to participate in binding arbitration. The arbitration agreement granted the arbitrator the power to decide all disputed issues in the divorce. After three months of hearings and telephone conferences, the parties reached a partial settlement agreement regarding the value of Dr. Torres's business, the Cascade Immediate Care Center, and custody and parenting time. The arbitrator decided issues of child and spousal support, denied Mrs. Torres's request for attorney fees, and resolved a claim for arrearages due under an earlier court order.

The October 10, 2012 arbitration award also purported to divide the entirety of the parties' property, including their retirement benefits. After allocating the parties' assets, the arbitrator summarized, "While the parties' overall distribution is not exactly equal, it will stand." The division slightly favored Mrs. Torres, who received \$428,299 in property while Dr. Torres was awarded \$420,683.

Both parties subsequently notified the arbitrator that he had omitted certain items of property from the division. Relevant to this appeal, the arbitrator neglected to address Dr. Torres's unvested Air Force pension. Mrs. Torres requested that the arbitrator award her half of the pension benefit that accrued during the parties' 18-year marriage.

On October 23, 2012, the arbitrator entered an order responding to the parties' concerns. He awarded the unvested Air Force pension entirely to Dr. Torres pursuant to the following logic:

At the September 6, 2012 Arbitration session there was very brief testimony from [Dr. Torres] that he is, in fact, eligible for a pension through the United States Air Force. At the current time the pension is unvested. No additional evidence was produced that there are currently any benefits to divide, the present value of those benefits, or any arguments relative to discounting present value, etc. Given the overall Award, which I deemed to have been in favor of [Mrs. Torres] as regards to premarital ownership interest in retirement funds and the lack of any credible evidence for the Arbitrator to determine a possible distribution or value of the unvested pension, I award the unvested pension solely to [Dr. Torres].

The circuit court thereafter confirmed the arbitration award on Dr. Torres's motion. One week later, the court entered a judgment of divorce consistent with the arbitration award. Mrs. Torres then filed a motion for rehearing.¹ She asserted that Dr. Torres's pension would vest after 20 years of service, and the parties were married for 18 of those service years.² According to Mrs. Torres, the court or arbitrator could distribute the accumulated amount, nine-tenths of the pension, by dividing that portion equally, which would result in Mrs. Torres's receipt of 45% of the pension benefits "if and when they vest."

Mrs. Torres challenged the arbitrator's stated reasons for not dividing the pension. She first argued that "the fact that the pension benefits have not vested does not prevent the Court from determining and awarding the marital portion thereof." As Mrs. Torres explained, the arbitrator and the court could apply a coverture factor to determine the marital property portion of the asset. Mrs. Torres further contended:

. . . [T]he marital portion can be awarded to [her] without effecting [sic] any other aspect of the Arbitrator's Award or the attended [sic] Judgment of Divorce. Specifically, the Arbitrator has already fashioned an award that does not value or include the accrued pension benefits in any way, and has found the award

¹ The circuit court confirmed the arbitration award on November 2, 2012. The timing of the court's confirmation of the arbitration award interfered with Mrs. Torres's right under MCR 3.602(J)(3) to file a motion to vacate the arbitration award within 21 days of its issuance.

² Given the passage of time while this appeal was pending, it is possible that Dr. Torres's right to the pension has since vested or will do so in the very near future.

to be congruent and equitable. The accrued pension benefits can be distributed completely irrespective of all other aspects of the property settlement. There is no value was [sic] assigned to the pension under the Arbitrator's Award and accordingly by dividing the accrued pension benefits between the parties, the percentage of property awarded will not be changed in any way.

Mrs. Torres implied that the arbitrator's failure to divide the Air Force pension altered the property award in an inequitable manner.

In response to the arbitrator's expressed concern regarding the value of the Air Force pension, Mrs. Torres observed that the court possessed authority under MCR 2.611(A)(2)(b) to receive additional evidence. She explained that she had not presented any valuation evidence because Dr. Torres never disputed that the Air Force pension benefits constituted marital property, and Mrs. Torres thus assumed the pension's value was undisputed. Mrs. Torres described the Air Force pension benefits as "substantial," "likely amount[ing] to hundreds of thousands of dollars over the span of the parties' retirement," and "most likely the largest single asset the parties accumulated during their marriage." She insisted that in light of her request "for a percentage based division," the arbitrator could not need more information regarding the pension's value.

The circuit court rejected Mrs. Torres's challenges, denied her motion for rehearing and left undisturbed the judgment of divorce based on the arbitration award. This appeal followed.

II. ANALYSIS

We review de novo a circuit court's ruling on a motion to vacate or modify an arbitration award. *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009). "Domestic-relations arbitration is governed by the specific statutory scheme set forth in the domestic relations arbitration act (DRAA)." *Cipriano v Cipriano*, 289 Mich App 361, 367; 808 NW2d 230 (2010). Judicial review of arbitration awards, including awards issued under the DRAA, is very limited. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991); *Washington*, 283 Mich App at 671. MCL 600.5081(2) sets forth the only circumstances under which a domestic-relations arbitration award may be vacated by a court:

If a party applies under this section, the court shall vacate an award under any of the following circumstances:

- (a) The award was procured by corruption, fraud, or other undue means.
- (b) There was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights.
- (c) The arbitrator exceeded his or her powers.
- (d) The arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

This statutory provision is consistent with MCR 3.602(J)(2), providing for vacation of general arbitration awards on the same grounds.

Mrs. Torres contends that vacation is justified because the arbitrator exceeded his powers. An arbitrator exceeds his powers when he “act[s] beyond the material terms of the contract from which [he] primarily draw[s] [his] authority, or in contravention of controlling principles of law.” *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982). Mrs. Torres asserts that that the arbitration award was “in contravention of controlling principles of law.” Parties submitting to statutory arbitration cannot agree to have their dispute “resolved in disregard of controlling principles of constitutional, statutory, or judge-made law, and expect the courts to approve and enforce the result.” *Id.* at 433. Such error “must be discernible on the face of the award itself,” however. *Washington*, 283 Mich App at 672. To be deemed discernible on the award’s face, the legal error must be “evident without scrutiny of [the arbitrator’s] intermediate mental indicia” or the arbitrator’s “mental path” in deriving the award. *Id.* (quotation marks and citations omitted).

Here, the arbitrator erroneously determined that the property division would remain equitable despite awarding as Dr. Torres’s sole property his unvested pension, which was accumulated during 18 years of marriage. The arbitrator’s conclusion typifies a ground meriting the vacation of an arbitration award: an error of law that is

so egregious, . . . so materially affect[s] the outcome of the arbitration, . . . so plainly demonstrate[s] a disregard of principles fundamental to a fair resolution of the dispute, or . . . so unequivocally generate[s] a legally unsustainable result, that [the erroneous legal conclusion] cannot be said to be within the parties’ agreement to arbitrate or the arbitrator’s authority. [*DAIIE*, 416 Mich at 430.]

The arbitrator explained that he awarded the Air Force pension solely to Dr. Torres because (1) it was unvested, (2) no evidence established the pension’s value, and (3) the property distribution overall favored Mrs. Torres. These grounds for declining division of the pension render the arbitration award facially unsound.

The unvested nature of the pension did not supply a valid reason to forego its division. MCL 552.18(2) grants courts the discretion to include unvested pension benefits in the divisible marital estate “where just and equitable.” No legal basis supported the exclusion of this asset simply because it was unvested.

The lack of evidence of the asset’s value also was not determinative. Usually, “[a]s a prelude to [a] property division, a trial court must . . . make specific findings regarding the value of the property being awarded in the judgment.” *Olson v Olson*, 256 Mich App 619, 627; 671 NW2d 64 (2003). But pensions are a unique breed of asset; if the holder has yet to retire or the pension otherwise has yet to vest, it may be difficult or impossible to calculate what the pension will be worth. Even if the pension has vested and the holder has retired, it is impossible to gauge how long the holder will survive and collect the benefit. Consequently, this Court has recognized that “no one valuation method is *required*; rather, the trial court, when valuing a pension, is obligated to reach a fair and equitable division of the property in light of all the circumstances.” *Heike v Heike*, 198 Mich App 289, 292; 497 NW2d 220 (1993) (emphasis in original).

One method for valuing or dividing a pension actually involves not assigning an exact worth. Instead, the court or the arbitrator can determine the coverture factor, a value used to “adjust[] the benefit to reflect any time for which the employee spouse was a member of the pension system [outside] the marriage,” and “reduce[] [the benefit] by multiplying it times the coverture factor.” *VanderVeen v VanderVeen*, 229 Mich App 108, 112; 580 NW2d 924 (1998) (quotation marks and citation omitted). Once the court or an arbitrator determines the number of pension years subject to division, it can award the nonemployee spouse an equitable percentage of the benefits.

Mrs. Torres sought an award premised on the coverture method of valuation—half of the Air Force pension that accrued during the 18-year marriage. And the military is statutorily obligated to honor such property divisions. The Uniformed Services for Spouses Protection Act, 10 USC 1408, which governs Dr. Torres’s pension, does not require an order setting the value of the pension and then dividing it by a set dollar amount. Rather, 10 USC 1408(a)(2)(C) honors court orders making a property distribution incident to divorce based on “a percentage of disposable retired pay [gross retired pay less allowable deductions].” See also Defense Finance & Accounting Services, <<http://www.dfas.mil/garnishment/usfspa/legal.html>> (accessed August 8, 2014).

Finally, the face of the award makes clear that the arbitrator did not reach an equitable property division. The arbitrator stated his intent to slightly favor Mrs. Torres, but awarded solely to Dr. Torres an asset, the value of which remained a mystery to the arbitrator. In this way, the arbitrator likely tipped the scales in favor of Dr. Torres, a result unintended by the award. Depending on the actual value of the pension, the disparity could be great.

Equity serves as the touchstone for property division in divorce actions. Although marital property need not be divided equally, it must be divided equitably in light of a court’s evaluation of the parties’ contributions, faults and needs. See *Sparks v Sparks*, 440 Mich 141, 149-150, 159-160; 485 NW2d 893 (1992). Dr. Torres’s commendable commitment to the Air Force entitles him to pension benefits after 20 years of service. This pension represents a form of deferred compensation for the services that Dr. Torres rendered to his country. Those services likely reduced his medical practice earnings and his other contributions to the household. Most of that time occurred in marital partnership with Mrs. Torres. The unvested military pension constitutes one of the fruits of that partnership. Its equitable division was required by law, and the arbitrator committed clear legal error by awarding the entire pension to Dr. Torres.

Accordingly, we reverse the circuit court’s affirmance of the arbitration award and remand for reconsideration of the pension distribution. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O’Connell